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FALSE IMPRISONMENT BY NONFEASANCE.

In the case of *Whittaker v. Sanford,* decided by the Supreme Court of Maine in the summer of 1913, the defendant, Frank Sanford, was the founder and leader of a religious sect, by which he was regarded as the second Elijah, who was to have temporal power over all the earth, and prepare it for the second coming of Chirst.[1] The plaintiff's husband was a minister of this sect, and the plaintiff herself had been a member for some years. The society had two colonies, one in Jaffa, Syria, the other in Shiloh, Maine; and they owned two sailing yachts, which served to transport the faithful between these colonies. While in Jaffa, the plaintiff had decided to renounce the sect, and to return to America by steamer. The defendant offered her transportation on the yacht "Kingdom", and promised that her liberty should not be restrained in any way. The jury found that after the arrival of the yacht in South Freeport harbor, the plaintiff was detained on board for nearly a month, by the simple means of refusing to provide a boat for her passage to the shore; and that defendant's influence over his officers and crew, who were all members of the

[1] 110 Me. 77.

sect, and over the plaintiff's husband was such that with them his word was law. They also found however that no direct force or threats of force were employed, and that the plaintiff was treated as a guest, with due courtesy and respect. On these facts, the form of action being on the case, the Supreme Court held that Sanford was guilty of a false imprisonment. The Court held further that while physical restraint is essential to this action, a force exercised upon the person is not.

In the case of *Herd v. Weardale Steel, Coal & Coke Co.*, decided on appeal in the King's Bench in the summer of 1913, it was held by a divided court that a mine owner's refusal to supply means for the plaintiffs', his employees, who had wrongfully quit work, to leave the mine, although the cage was idle for a short time during their detention, was not false imprisonment.[2]

Here are two cases in which it is held, in the one by the full court, in the other by a minority of the court, that when A is confined on B's premises (to which position the act of B contributed to bring him, although it does not appear that that is essential), there is a positive duty upon B to extricate him. This duty, moreover, does not arise out of any contract, but the breach of it is apparantly a tort. Contrast this duty with the ordinary duty not to imprison another falsely.

Judge Cooley, in his treatise on "The Elements of Torts", defines false imprisonment to consist "in imposing by force or threats an unlawful restraint upon a man's freedom of movement."[3] Analyzing this definition, we find three essential elements, the restraint, the illegality, which must mean simply the lack of just cause or excuse, and the means employed, which must be force or threats. There is no doubt that the first two elements were present in both cases stated above, and it is with the third that we are concerned here. Let us examine a few cases, to see how they have satisfied this third requirement.

In the case of *Fotheringham v. Adams Express Co.*, the defendant's detectives were in constant attendance upon the plaintiff for about two weeks, and although they never laid hands on him, he knew perfectly well that if he attempted to get away he would be restrained.[4] Here certainly we have positive physical acts, which

[2] 3 K. B. 771 (June, 1913).

[3] P. 50, tit. False Imprisonment.

[4] 36 Fed. R. 252.

might well be dignified by the name of force, although none of them were applied to the person of the plaintiff.

In *Pike v. Hanson* it was held that the mere words, "I arrest you", if they actually constrain the plaintiff to some act of obedience, may constitute a false imprisonment.[5] Yet here we have, not a refusal to do something, but positive words, which might well be interpreted as a threat of force.

It is also worthy of note that the proper form of action for this wrong has generally been held to be the common law action of trespass or its equivalent, which is further proof that some positive act is usually required.[6] In view of this latter consideration, we must attach a peculiar significance to the fact that *Whittaker v. Sanford* was an action on the case. Although courts may have extended the common law action of trespass to include positive acts which involve no direct application of force, they instinctively shrink from applying it to a case where the omission to do any act at all is the wrong complained of. The principal case was one of pure nonfeasance, and the action on the case seemed the most appropriate remedy. This, however, clearly distinguishes it and the corresponding English case from all the cases of false imprisonment hitherto decided. It is no longer a negative duty, the duty not to imprison another falsely, which the law is enforcing, but a positive commandment. Wrongs arising out of mere nonfeasance, though common in the law of contract and quasi-contract, have been rare in the law of tort. An example is the duty which the law imposes on the common carrier to receive and transport the goods of all without discrimination. A few other similar duties might be mentioned, which the law has imposed since early times. But the courts have been slow to create new positive duties of this type. It has never been held that a person was under a legal duty to lift a hand to save another from death, even where it could be done with no danger whatever to himself. But it is submitted that the principal case is a notable step in that direction, and that, while the decision itself seems sound, it is a radical departure from the established principles of false imprisonment.

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[5] 9 N. H. 491.

[6] *Williams v. Ivey*, 37 Ala. 244; *Maher v. Ashmead*, 30 Pa. St. 344.